

# Minutes of the April 23, 1998, United States Sentencing Commission Business Meeting

The meeting was called to order at 11:02 a.m. by Chairman Richard P. Conaboy in the Commissioner Conference Room. The following commissioners, staff, and guests participated:

Richard P. Conaboy, Chairman (via telephone)  
Michael S. Gelacak, Vice Chairman  
Michael Goldsmith, Commissioner  
Deanell R. Tacha, Commissioner (via telephone)  
Mary F. Harkenrider, *Ex Officio* Commissioner (via telephone)  
John H. Kramer, Staff Director  
John R. Steer, General Counsel  
Judith Sheon, Principal Technical Advisor  
Alan Chaset, Representative, Practitioners' Advisory Group  
Tom Hutchison, Representative, Federal Public Defenders  
*Ex Officio* Commissioner Michael J. Gaines was unable to attend.

Motion made by Commissioner Tacha to adopt the minutes of the April 7, 1998, business meeting; seconded by Commissioner Goldsmith. The April 7, 1998, business meeting minutes will be corrected to reflect in Circuit Conflicts Issue 4 (aberrant behavior) a 2-1-1 vote instead of the 2-2-1 vote incorrectly recorded. Passed unanimously.

## Circuit Conflict

### Issue 9: Diminished Capacity

This amendment clarifies that "significantly reduced mental capacity" applies to convicted defendants with significantly impaired ability." The amendment was passed originally at the April 7, 1998, meeting. That amendment addressed whether a diminished capacity departure is precluded if the defendant committed a "crime of violence" as defined in §4B1.2.

Motion made by Commissioner Goldsmith to adopt; seconded by Commissioner Tacha. Passed unanimously.

## Amendments

### Amendment 11: Prohibited Persons

This amendment responds to section 658 of the Treasury, Postal Service and General Government Appropriations Act, 1997, expanding the definition of a prohibited person and addresses a proposed congressional directive contained in juvenile justice legislation.

Motion made by Commissioner Tacha to adopt the revised proposed amendment, Option 1, with the bracketed language; seconded by Commissioner Goldsmith. Commissioner Tacha voted in the affirmative, with Chairman Conaboy and Vice Chairman Gelacak voting against, and Commissioner Goldsmith abstaining. Failed 1-2-1.

Motion made by Commissioner Tacha to adopt the revised proposed amendment, Option 2; seconded by Commissioner Goldsmith. Passed unanimously.

### Amendment 6: Telemarketing Fraud

This amendment provides a new enhancement for any fraudulent activity that relies on mass-marketing to perpetrate the offense, whether the offense involves telemarketing fraud, Internet fraud, or other type of fraudulent scheme.

Motion made by Commissioner Tacha to adopt the revised proposed amendment, with the bracketed language

establishing a floor for the offense; seconded by Commissioner Goldsmith. Commissioners Goldsmith and Tacha voted in the affirmative, with Chairman Conaboy and Vice Chairman Gelacak voting against. Failed 2-2.

Motion made by Commissioner Tacha to adopt the revised proposed amendment without the bracketed language; seconded by Commissioner Goldsmith. Passed unanimously.

#### Sophisticated Concealment

This amendment conforms the theft guideline with the amendment to the fraud guideline passed at the April 7, 1998, business meeting, which among other things provided a two-level increase for sophisticated concealment.

Motion made by Commissioner Tacha to adopt Part (A); seconded by Commissioner Goldsmith. Commissioners Goldsmith and Tacha voted in the affirmative, with Vice Chairman Gelacak voting against, and Chairman Conaboy abstaining. Failed 2-1-1.

Motion made by Commissioner Goldsmith to adopt Part (A) without the offense level floor; seconded by Commissioner Tacha. Commissioners Goldsmith and Tacha voted in the affirmative, with Vice Chairman Gelacak voting against, and Chairman Conaboy abstaining. Failed 2-1-1.

#### Modification of "Sophisticated Means" in Tax Guidelines

This amendment resolves the circuit conflict regarding whether "sophisticated means" applies based upon the personal conduct for which the defendant is accountable.

Motion made by Commissioner Tacha to adopt Option 1 without the offense level floor; seconded by Commissioner Goldsmith. Commissioners Goldsmith and Tacha voted in the affirmative, with Vice Chairman Gelacak voting against, and Chairman Conaboy abstaining. Failed 2-1-1.

#### Sophisticated Concealment, Tax Guidelines

Motion made by Commissioner Tacha to adopt Option 2 without the offense level floor; seconded by Commissioner Goldsmith. Passed unanimously.

Motion made by Commissioner Tacha to adopt the rest of Option 2 (pertaining to §2T1.4 and §2T3.1) without the offense level floor; seconded by Commissioner Goldsmith. Passed unanimously.

#### Amendment 9: Electronic Copyright Infringement

This amendment implements directives contained in the No Electronic Theft Act, Pub. L. No. 105-147.

Chairman Conaboy stated that the Commission is struggling to respond to the congressional directive. He stated that although the Commission has gathered testimony at a public hearing, circulated a number of options, reviewed a significant amount of cases and other types of research, as well as comments and suggestions from others, this complicated area needs further study. For example, in determining the amount of loss, should it be based on the amount of loss of the infringing product or the product that was infringed upon?

Motion made by Commissioner Tacha to publish in the *Federal Register* for comment the proposed materials, the congressional directive language, a generic issue for comment, and an issue pertaining to emergency authority; seconded by Commissioner Goldsmith. Passed unanimously.

Motion made by Commissioner Gelacak to give staff authority to make necessary technical and conforming changes to the adopted amendments; seconded by Commissioner Tacha. Passed unanimously.

Motion made by Commissioner Goldsmith to forward the adopted amendments to Congress, with an effective date of

November 1, 1998; seconded by Commissioner Tacha. Passed unanimously.

Chairman Conaboy adjourned the meeting at 12:02 p.m.